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In the Supreme Court of the United States

October Term, 1982

THOMAS P. VANN and JAMES E. MELHORN,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of The National Association of Criminal Defense Lawyers As Amicus Curiae in Support of Petitioners

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QUESTION PRESENTED

Did the government's proving the necessary elements of a conspiracy charge with hearsay statements of absent co-conspirators without first establishing these declarants' unavailability violate the Confrontation Clause of the Sixth Amendment?

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers was founded a quarter of a century ago to promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the field of criminal defense practice, to promote proper administration of criminal justice, and to encourage the integrity, independence, and expertise of the criminal defense practitioner. The members of the Association are criminal defense lawyers who devote the major portions of their professional lives to defending persons accused of crimes.

The primary interest of the membership of the Association is to ensure that fundamental rights are recognized and afforded all persons. Conspiracy cases, of course, invariably present serious threats to these fundamental rights. At petitioners' trial, for example, the district court admitted into evidence uncross-examined co-conspirator statements necessary to prove the government's case.

Because co-conspirator hearsay is often unreliable, the opportunity to cross-examine declarants guaranteed by the Sixth Amendment's Confrontation Clause is necessary to prevent unjust convictions. Lately, however, many courts have countenanced prosecutorial circumvention of Sixth Amendment restrictions imposed by this Court on the use of these

often untrustworthy declarations. *E.g., United States v. Perez,* 658 F. 2d 654 (9th Cir. 1981); *United States v. Peacock,* 654 F. 2d 339 (5th Cir. 1981). Unfortunately, the Sixth Circuit's lackadaisical treatment of petitioners' confrontation contention continues this tendency.

The National Association of Criminal Defense Lawyers therefore offers this brief in support of the petition for a writ of certiorari and humbly urges the Court to restore the Confrontation Clause as a shield against unfair convictions by squarely holding that evidence admissible under Federal Rule of Evidence 801(d)(2)(E) may not be introduced unless the prosecutor either produces the declarant or proves his unavailability.

Counsel for both parties have given their consent to the filing of this Amicus Curiae brief. Their letters of consent are on file with the Court.

SUMMARY OF PROCEEDINGS

I. In the District Court.

The government charged that defendants Vann and Melhorn participated in a Sherman Act conspiracy comprised of ten sub-agreements. To prove four of these sub-agreements, the government sought to introduce under Federal Rule of Evidence 801(d)(2)(E) through the testimony of alleged co-conspirator Fugate the out-of-court statements of two other alleged co-conspirators, Pendleton and Malone. Because the government did not present any proof of Pendleton's and Malone's unavailability, defendants, asserting that the admission of this key testimony would violate their Sixth Amendment right to confront the witnesses against them, objected to its admission.

The district court, however, ruled that out-of-court declarations admissible under Rule 801(d)(2)(E) automatically satisfy the requirements of the Confrontation Clause and

overruled the objection. As a result, defendants Vann and Melhorn were unable to cross-examine Malone and Pendleton about the truth of these incriminating statements.

II. In the Court of Appeals for the Sixth Circuit.

Relying on *Ohio v. Roberts*, 448 U.S. 56 (1980), defendants contended in the Court of Appeals for the Sixth Circuit that the district court's refusal to require the government to show that Malone and Pendleton could not be produced for trial violated their constitutional right to confront their accusers. Without mentioning *Roberts* or any other Supreme Court case, the Sixth Circuit cited, but did not analyze, a spray of Court of Appeals cases and smugly observed that

> [w]e need not intimate a view on whether the admission of evidence under Fed. R. Evid. 801(d)(2)(E) raises confrontation clause problems. Whether applying the rule that evidence admitted under the federal co-conspirator exception automatically complies with the requirements of the confrontation clause, or the rule that the declarant must be unavailable, unless the evidence is neither crucial to the prosecution nor devastating to the defendant, the testimony in dispute is admissible.

Order in United States v. Melhorn (82-5384) and Vann (82-5385). *See* Petitioners' Brief at 8a.

III. In the Supreme Court.

The defendants now have petitioned this Court to consider, inter alia, their assertion that the Sixth Circuit erred in failing to require the government to comply with the requirement established by this Court that the prosecution must either produce, or demonstrate the unavailability of, the makers of accusatory statements it seeks to introduce against defendants.

Because the Sixth Circuit's decision strips away the confrontation protection forged by this Court, the National Association of Criminal Defense Lawyers, as amicus curiae, presents this brief in support of petitioners Vann and Melhorn.

SUMMARY OF ARGUMENT

The district court's failure to require the government to produce the declarants of incriminating hearsay admitted under Federal Rule of Evidence 801(d)(2)(E) or to prove their unavailability violated petitioners' Sixth Amendment right to confront the witnesses against them.

The Sixth Circuit's affirmance, based either on the "rule" that evidence admissible under Rule 801(d)(2)(E) automatically complies with the Confrontation Clause or the "rule" that the Confrontation Clause requires a prosecutor to demonstrate the unavailability of a hearsay declarant before introducing out-of-court statements only when the statements are "crucial to the prosecution" or "devastating to the defendant" is clearly inconsistent with this Court's Confrontation Clause decisions, *e.g.*, *Ohio v. Roberts*, 448 U.S. 56 (1980), which demand production of the declarants, proof of their unavailability, or a demonstration of the remoteness of the utility of the declarants' cross-examination as a condition to the admission of the hearsay.

Because the government refused to comply with any of these requirements, petitioners' rights under the Confrontation Clause were violated, and the decision of the Sixth Circuit affirming the convictions should be reversed.

REASON FOR GRANTING THE WRIT OF CERTIORARI

THE SIXTH CIRCUIT'S FAILURE TO EXAMINE WHETHER THE GOVERNMENT AT TRIAL HAD PROVEN THE UNAVAILABILITY OF THE MAKERS OF INCRIMINATING EXTRAJUDICIAL STATEMENTS BEFORE THESE HEARSAY DECLARATIONS WERE ADMITTED UNDER FEDERAL RULE OF EVIDENCE 801(d)(2)(E) PREVENTED VINDICATION OF PETITIONERS' CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST THEM.

I. Introduction.

In rejecting appellants' contention that the district court's refusal to require a showing of Malone and Pendleton's unavailability violated their confrontation rights, the Court of Appeals, without specifying one particular basis for its decision, noted that its refusal to require a showing of Pendleton's unavailability could be bottomed on either the rule that Rule 801(d)(2)(E) statements automatically satisfy the Confrontation Clause or the rule that the declarant must be proven unavailable only when the evidence is crucial to the prosecution or devastating to the defendant. Because neither of these principles has been approved by this Court and because the Court of Appeals failed to apply the rule of necessity consistently relied upon by the Court and clearly explained in *Ohio v. Roberts*, 448 U.S. 56 (1980), the petition for a writ of certiorari should be granted and the Court of Appeals' decision reversed.

II. This Court has never suggested that evidence admissible under Federal Rule of Evidence 801(d)(2)(E) automatically satisfies Confrontation Clause requirements.

The Supreme Court clearly has never endorsed the rule put forth by the Court of Appeals that evidence admissible under

Federal Rule of Evidence 801(d)(2)(E), the federal co-conspirator hearsay "exception" rooted in common law, *e.g.*, *United States v. Gooding*, 245 U.S. (12 Wheat.) 460, 469-70 (1827), automatically complies with the requirements of the Confrontation Clause. Instead, the Court has emphasized that admissibility under a hearsay exception does not guarantee conformance with the Confrontation Clause. As the Court in *California v. Green*, 399 U.S. 149, 155 (1970), explained,

> [w]hile it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence . . . .

And after noting that the hearsay rule and the Confrontation Clause stemmed from the same roots, the Court in *Dutton v. Evans*, 400 U.S. 74, 86 (1970), cautioned that the two evidentiary shields required separate analyses of extrajudicial declarations: "But this Court has never equated the two, and we decline to do so now."

Furthermore, the Court in *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), emphasized that the range of *all* admissible hearsay was restricted by the Confrontation Clause. First, the Court ruled, the prosecution must produce or prove the unavailability of a hearsay declarant whose statement it seeks to introduce against the defendant. Second, once the declarant is proven unavailable, the prosecution must show that the declaration is reliable. Although the Court did note that the reliability requirement would be satisfied by most hearsay admissible under the dying declaration, cross-examined prior-trial testimony, and business and public

records exceptions, it did not state that co-conspirator hearsay would be entitled to any such presumption of reliability or compliance with the Confrontation Clause. *Id.* at 66, n. 8 and accompanying text.

The *Roberts* Court's concern that exempting co-conspirator statements from independent Confrontation Clause scrutiny would frustrate one of the Clause's purposes, the "advance[ment of] a practical concern for the accuracy of the truth-determining process in criminal trials," *Dutton v. Evans*, *supra*, at 89, was clearly evident in *Dutton*, in which the Court, far from deciding that evidence admitted under a co-conspirator exception automatically fulfilled Confrontation Clause requirements, subjected a statement admitted under a co-conspirator exception to a rigorous examination under the Confrontation Clause before holding that the statement's introduction did not violate the defendant's Sixth Amendment rights. Indeed, instead of indicating that constitutional inquiry could be in any way relaxed because the hearsay was admissible under a co-conspirator exception, the Court held that the defendant's confrontation rights had not been violated only because the testimony "was of peripheral significance at most" and the possibility that the particular hearsay statement could have been proven unreliable was "wholly unreal." *Dutton*, *supra*, at 87, 89.

The Court's fear that co-conspirator hearsay is far too untrustworthy to escape stringent Confrontation Clause scrutiny is justified. Co-conspirator hearsay is permitted under "the theory that the declarant is the agent of the [defendant]. *Lutwak v. United States*, 344 U.S. 604, 617 (1953); *accord*, *United States v. Gooding*, *supra*, at 468-70. That this theory does not assure reliable evidence was recognized by Professor Morgan, who noted that the application of the agency theory to conspiracy cases produces "bizarre interpretations." Morgan,

The Rationale of Vicarious Admissions, 42 HARV. L. REV. 461, 481 (1929). Even the Advisory Committee Note to Federal Rule of Evidence 801(d)(2)(E) acknowledges that the "agency theory of conspiracy is at best a fiction," and Professor McCormick observed that

> doubts raised by conspiracy prosecutions in principle and by the tenuous character of the agency concept in this context have led to rejection of [the exception's] extension ....

C. MCCORMICK, EVIDENCE 646, n. 28 (2d ed. 1972).

As a New Jersey Supreme Court committee on evidence noted,

> [t]o admit the hearsay statements of a co-conspirator merely because of a highly controversial belief that they are more likely to be true than not is insufficient. Many of those who have closely studied the problem of conspiracy are in agreement that such evidence is highly unreliable; the hearsay statements of alleged co-conspirators are perhaps the most suspect of all. To permit criminal convictions to be based on such evidence would be unfair and impractical.

Report, New Jersey Supreme Court, Committee on Evidence 167 (1963).

Because of the unreliability of co-conspirator declarations, application of the automatic compliance rule by the Sixth Circuit and other Courts of Appeals, *see, e.g., United States v. Papia*, 560 F.2d 827, 836, n. 3 (7th Cir. 1977); *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972), is disturbing. To lessen the danger of unfair convictions based on uncross-examined co-conspirator declarations, this Court should make express its implicit rejection of the automatic compliance rule by reversing the decision of the court below.

III. The rule that the prosecution must either produce or prove the unavailability of the declarant is not limited to crucial or devastating testimony.

Noting the "Framers' preference for face-to-face accusation" and the Confrontation Clause's "underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence," the court in *Ohio v. Roberts*, *supra*, at 65, declared:

> [T]he Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

The Court then explained that the "usual case" included all cases except those in which "the utility of trial confrontation [is] . . . remote." *Id.* at 65, n. 7. Therefore, it very clearly did not limit the rule of necessity to crucial or devastating evidence but created a very limited exception under which proof of unavailability will be excused only upon a clear showing by the prosecution of the futility of cross-examination. The Court's recognition of the value of cross-examination strongly suggests that the invocation by prosecutors of the exception should be rarely permitted:

> [Cross-examination is] a right deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the Constitutions of most, if not of all, the states composing the Union.

Kirby v. United States, 174 U.S. 47, 56 (1899); *see California v. Green*, 399 U.S. 149, 158 (1970) (cross-examination is the "'greatest legal engine ever invented for the discovery of

truth'''); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (cross-examination is a "necessity" for protection of defendants in criminal cases); *Alford v. United States*, 282 U.S. 687, 692 (1931) (cross-examination is "essential to a fair trial").

Moreover, this Court's pre-*Roberts* holdings reveal that a strong necessity rule is indispensable to the viability of the Confrontation Clause. In *Mattox v. United States*, 156 U.S. 237, 242 (1895), the Court explained the need for in-court cross-examination:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as was sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

As the Court in *Ohio v. Roberts*, *supra*, was to do later, the *Mattox* Court then emphasized that the prosecution's duty to produce the witness would be excused only by "the necessities of the case" and consequently held that the prior trial testimony of a deceased witness, like dying declarations, could be admitted without violating defendant's confrontation rights. *Mattox*, *supra* at 243.

In *Reynolds v. United States*, 98 U.S. 145 (1879), the Court upheld the government's introduction of prior trial testimony only because the defendant was responsible for the declarant's unavailability at trial. In *Kirby v. United States*, 174 U.S. 47, 61 (1899), the Court reversed defendant's convictions because the admission of hearsay evidence in Kirby's trial, unlike dying declarations, did not "arise from the necessity of the

case." Likewise, the Court in *Motes v. United States*, 178 U.S. 458, 471 (1900), held error the admission of cross-examined preliminary examination testimony even though the declarant was not present during trial because the absence "was manifestly due to the negligence of the officers of the Government."

More recently, the Court reversed defendant's conviction in *Barber v. Page*, 390 U.S. 719 (1968), because the trial court had permitted the State of Oklahoma to introduce preliminary hearing testimony without making a good faith effort to produce the declarant. In *California v. Green*, *supra*, at 166-70 (1970), the Court again relied upon the rule of necessity to hold permissible the introduction of preliminary hearing testimony of a witness present at trial but assertedly unable to recall events inculpating the defendant:

> If Porter had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony given at the preliminary hearing — the right of cross-examination then afforded provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State.
>
> . . .
>
> As in the case where the witness is physically unproducible, the State here has made every effort to introduce its evidence through the live testimony of the witness; it produced Porter at trial, swore him as a witness, and tendered him for cross-examination.

This Court's disposition of Confrontation Clause cases, therefore, has turned on whether the prosecution has complied with a tightly construed rule of necessity that has permitted the introduction of hearsay only when the prosecutor has proven the declarant to be unavailable. None of these decisions limit

the rule's application to devastating or crucial evidence, and as *Ohio v. Roberts*, *supra*, makes explicit, no such restriction upon the rule has ever been intended by this Court.

The Sixth Circuit's erroneous limitation of the rule of necessity is apparently based on a declaration in *Dutton v. Evans*, *supra*, at 87, that "[t]his case does not involve evidence in any sense 'crucial' or 'devastating.'" Although the Court was distinguishing the facts in *Dutton* from other cases in which the Court had required a demonstration of the unavailability of the maker of a hearsay statement, the Court clearly did not intend to eviscerate its often issued command that the prosecution must either produce or demonstrate the unavailability of the makers of incriminating hearsay statements. Instead, as later made plain in *Ohio v. Roberts*, *supra*, the holding in *Dutton* recognized a narrow exception to the unavailability requirement: when the utility of trial confrontation is remote, the prosecution may introduce hearsay without infringing upon a defendant's confrontation rights. *Roberts*, *supra*, at 65, n. 7. In *Dutton*, this remoteness was a product of the "peripheral significance at most" of the hearsay statement, *id.* at 87; the effectiveness of a cross-examination that "casts serious doubt on Shaw's [the witness who claimed to hear the out-of-court statement] credibility and, more particularly, on whether the conversation which Shaw related ever took place," *id.* at 88, n. 18; and the "wholly unreal" possibility that cross-examination could have shown the hearsay statement to be unreliable. *Id.* at 89.

The Court in *Dutton*, then, in no way weakened the confrontation protection it had fashioned for defendants in earlier decisions by limiting the rule of necessity to crucial or devastating hearsay evidence. Instead, the Court simply stated the obvious corollary to the availability rule: when the government proves that cross-examination of the maker of an

out-of-court statement would clearly be fruitless, it is excused from producing the declarant or proving his or her unavailability.

IV. The Third Circuit's holding in *United States v. Gibbs* is a correct application of the availability rule to Federal Rule of Evidence 801(d)(2)(E) declarations.

Faced with the issue of whether the government had to comply with the availability rule before introducing co-conspirator hearsay admissible under Federal Rule of Evidence 801(d)(2)(E), the Third Circuit in *United States v. Gibbs*, 703 F.2d 683 (3rd Cir. 1983), carefully adhering to this Court's holdings and applying the remoteness-of-cross-examination test set forth in *Ohio v. Roberts, supra,* flatly rejected the government's contention that a showing of unavailability was not required when the extrajudicial declarations satisfied Rule 801(d)(2)(E) and reversed defendant's conviction because the government "has not carried its burden" of proving "that the hearsay is sufficiently reliable and insignificant to justify dispensing with a showing of unavailability." *Id.* at 693, 694.

This sound decision illustrates the need for reversal of the Sixth Circuit's holding in the present case. As in *Gibbs*, the prosecutor refused even to attempt to justify his failure to demonstrate the unavailability of the declarants, Pendleton and Malone. Also as in *Gibbs*, justification would have been impossible. Because the admitted co-conspirator testimony was necessary to prove four of the ten sub-agreements alleged by the government to comprise the conspiracy, the testimony was clearly of greater than "peripheral significance at most" and the utility of cross-examination therefore not remote. Consequently, under *Gibbs* and the pertinent Supreme Court holdings on which it is based, reversal of the Sixth Circuit's decision is required.

CONCLUSION

To remedy the violation of petitioners' confrontation rights and to stop the increasing tendency of federal courts to ignore the confrontation rights of those citizens accused of engaging in conspiracies, the Court should grant the petition for a writ of certiorari filed by Thomas P. Vann and James E. Melhorn.

Respectfully submitted this 12th day of August, 1983.

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